SCC File No.:

IN THE SUPREME COURT OF CANADA
(ON APPEAL FROM THE COURT OF APPEAL FOR ONTARIO)

BETWEEN:

TELUS COMMUNICATIONS COMPANY, TELE-MOBILE COMPANY and TELUS COMMUNICATIONS INC.

APPLICANTS
(APPELLANTS)

and

AVRAHAM WELLMAN

RESPONDENT
(RESPONDENT)

MEMORANDUM OF ARGUMENT OF TELUS COMMUNICATIONS COMPANY, TELE-MOBILE COMPANY and TELUS COMMUNICATIONS INC.

PART I - OVERVIEW AND STATEMENT OF FACTS

A. Overview

1. The applicants (collectively, "TELUS Mobility")[1] apply for leave to appeal from a judgment of the Court of Appeal for Ontario, handed down May 31st, 2017, which permits claims by business customers to proceed in court despite a mandatory arbitration clause in the TELUS Mobility contracts.

2. In *Seidel v. TELUS Communications Inc.*, this Court emphatically stated that "[a]bsent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause".[2] In this case, the Ontario Court of Appeal permitted the procedural mechanism of a mass consumer class action to override the lawful choice of arbitration by business customers purchasing telecommunications services. The Court of Appeal determined that it was constrained by its own earlier decision, *Griffin v. Dell Canada Inc.*,[3] even though that decision is inconsistent in approach and result with *Seidel*. Chief Justice Richards, for the Saskatchewan Court of Appeal, observed in a recent decision which reaches the opposite conclusion to *Griffin v. Dell* that this "raises a basic question about the proper fit between arbitrations and court proceedings dealing with the same or connected subject matters."[4] There are now inconsistent lines of authority in the provincial Courts of Appeal, demonstrating that confusion and uncertainty remain over how to resolve this "basic question" in light of the statutory right of a party to choose arbitration to resolve disputes.

3. Here, the Ontario courts decided that there was a discretion to include the claims of business customers (representing 30% of the class) as part of a class action brought by consumers against TELUS Mobility. While Ontario consumer protection legislation provides that mandatory arbitration clauses are invalid in respect of consumer claims the

---

[1] The applicant partnership TELE-Mobile Company no longer exists; its assets and liabilities have been transferred to the applicant TELUS Communications Inc. by operation of law.

[2] *Seidel v. TELUS Communications Inc.*, [2011] 1 S.C.R. 531, 2011 SCC 15 at para. 2.

[3] *Griffin v. Dell Canada Inc.*, 2010 ONCA 29; application for leave to appeal to this Court dismissed May 20, 2010 (SCC File No. 33588).

[4] *Saskatchewan Power Corporation v. Alberici Western Constructors, et al.*, 2016 SKCA 46 at para. 1.

legislation does not invalidate arbitration clauses in respect of claims by business customers.

4. TELUS Mobility applied for a stay of the proceedings brought by business claimants. The Ontario *Arbitration Act*[5], like arbitration statutes throughout the country, provides that courts shall stay court proceedings where disputes are required to be arbitrated except in certain limited circumstances (which have no application here). The Ontario Court of Appeal decided, however, that a "partial stay power" in subs. 7(5) of the Ontario *Arbitration Act* authorizes the court to refuse a stay of arbitrable claims. Subsection 7(5) reads as follows:

> **Agreement governing part of a dispute**
>
> **7**. (5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,
>
> (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
>
> (b) it is reasonable to separate the matters dealt with in the agreement from the other matters.

5. With respect, and as noted in the contrary authorities and academic commentary, this subsection simply does not say what the Court of Appeal found. It does not provide a legislative override of an otherwise enforceable arbitration agreement. Subsection 7(5) does not permit the court to allow "matters dealt with in the arbitration agreement" to continue in court; those matters are to be stayed. Subsection 7(5) allows the court to permit "other matters" to continue in court. The Ontario courts' interpretation of subs. 7(5) is a manifest misreading of the legislation. Here, the arbitration agreement covers all disputes between TELUS Mobility and its business customers – there are no other "matters" as between TELUS Mobility and its business customers that are not subject to the arbitration clause. Claims that are subject to a mandatory arbitration clause, including the business claims in this case, should be resolved in the manner agreed to by contract, through arbitration.

---

[5] *Arbitration Act, 1991,* S.O. 1991, c. 17.

6. The Court of Appeal's erroneous interpretation of the "partial stay" power had been developed in its earlier judgment, *Griffin v. Dell*, and the Court declined to revisit that decision even though it is contrary to this Court's judgment in *Seidel.* The dissenting justice in the Court of Appeal, Blair J.A., expressed serious reservations about the correctness of the decision in *Griffin v. Dell*. Blair J.A. noted that the text of subs. 7(5) does not support the power to refuse a stay. More generally, Blair J.A. recognized that the refusal to stay business claims means that litigants can employ the procedural mechanism of a class proceeding to override mandatory arbitration. Blair J.A. questioned whether litigants should be able to "sidestep what would otherwise be substantive and statutory impediments to proceeding in court with an arbitral claim by the simple expedient of adding consumer claims (which cannot be stayed, by virtue of the *Consumer Protection Act*…) to non-consumer claims (which generally are subject to a mandatory stay) and wrapping all claims in the cloak of a class proceeding?"[6] In light of this Court's decisions, which establish that the procedural device of a class proceeding does not override arbitration agreements, the answer to that question must be "no". It is of importance to the adjudication of the many claims subject to a lawful choice of arbitration that this Court resolve this ongoing confusion.

7. The Court of Appeal decided it could distinguish this Court's decision in *Seidel* because of differences between the legislation of Ontario and British Columbia, where *Seidel* originated.[7] With respect, the only evident difference is that the Ontario *Arbitration Act* contains subs. 7(5). To repeat, however, subs. 7(5) does not authorize the court to ignore mandatory arbitration of business claims. The Ontario Court of Appeal had no proper ground to reject the instruction given by this Court in *Seidel*.

8. Courts in other provinces, accepting this Court's decisions, decline to include business claims in prospective consumer class actions. The Ontario interpretation of the "partial stay" power has been questioned by the Saskatchewan Court of Appeal and by learned commentators. The decision below results in inconsistent approaches across the country to a general principle of national importance - the enforceability of arbitration agreements absent a clear legislative override.

---

[6] *Wellman v. TELUS Communications Company et al.,* 2017 ONCA 433 ("ONCA judgment"), paras. 104-105.
[7] ONCA judgment, para. 8.

B. Nature of the claim and the Arbitration Agreement

9. The respondent (plaintiff) Avraham Wellman applied for certification of a class proceeding brought on behalf of customers who had contracts with TELUS Mobility for mobile talk services. The plaintiff asserts that it was a term of the contracts that TELUS Mobility would charge customers on the basis of a per-second method of billing and that TELUS Mobility breached those contracts, or otherwise engaged in deceptive acts or practices, by "rounding up" calls to the next minute.[8]

10. TELUS Mobility's contracts contained standard terms and conditions including a mandatory arbitration clause (the "Arbitration Agreement"). The Arbitration Agreement provides that any claim, dispute or controversy (whether in contract or tort, pursuant to statute or regulation, or otherwise) will be referred to mediation and, if the parties fail to reach agreement at mediation, to binding arbitration.[9]

11. TELUS Mobility has conceded that the Arbitration Agreement does not preclude certification of a class proceeding brought on behalf of "consumers" as defined in the *Consumer Protection Act, 2002*.[10] Subsection 7(2) of the *Consumer Protection Act*[11] provides that "any term or acknowledgment in a consumer agreement or a related agreement that requires or has the effect of requiring that disputes arising out of the consumer agreement be submitted to arbitration is invalid insofar as it prevents a consumer from exercising a right to commence an action…". TELUS Mobility maintains, however, that the Arbitration Agreement is valid and binding for business subscribers, who represent approximately 30% of the class, or 600,000 prospective class members. Those subscribers should not be included in the class proceeding.

12. This Court's judgment in *Seidel v. TELUS Communications Inc.*[12] confirms that a court has no jurisdiction over claims subject to arbitration in the absence of a clear legislative override of the arbitration clause. Here, there is no clear legislative override that would limit the effect of the arbitration clause in business customer agreements. This is in sharp contrast to the clear legislative override that exists in respect of consumer claims.

---

[8] *Wellman v. TELUS Communications Company et al.*, 2014 ONSC 3318 ("ONSC judgment"), paras. 1-2, 15-17.
[9] ONCA judgment, paras. 3, 14.
[10] *Consumer Protection Act, 2002*, S.O. 2000, c. 30.
[11] In force July 30, 2005.
[12] *Seidel v. TELUS Communications Inc.*, [2011] 1 S.C.R. 531, 2011 SCC 15.

13. On the basis of the Arbitration Agreement and this Court's judgment in *Seidel*, TELUS submitted that all claims on behalf of proposed class members who are business customers must be stayed.

C. Judgment of the motions judge (Conway J., 2014 ONSC 3318)

14. The motions judge certified the action as a class proceeding. The motions judge rejected TELUS Mobility's position that claims brought by business customers must be stayed.

15. The motions judge concluded that *Seidel* did not overrule the Ontario Court of Appeal's earlier decision in *Griffin v. Dell Canada Inc.*.[13] In *Griffin*, the Court of Appeal had concluded that s. 7(5) of the Ontario *Arbitration Act* "confers a discretion to grant a partial stay where an action involves some claims that are subject to an arbitration and some claims that are not".[14]

16. To repeat, subs. 7(5) provides:

> **Agreement covering part of dispute**
>
> (5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,
>
> > (a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and
> >
> > (b) it is reasonable to separate the matters dealt with in the agreement from the other matters.

17. On the basis of this provision, the Court of Appeal concluded in *Griffin* that it was appropriate to "refuse a partial stay" of claims brought by business users and to allow all consumer and business claims to proceed "under the umbrella of the class proceeding".[15]

18. With respect, and as explained earlier, subs. 7(5) does not authorize a court to refuse a stay of proceedings that are "dealt with in the arbitration agreement". On its face, subs.

---

[13] *Griffin v. Dell Canada Inc.*, 2010 ONCA 29; application for leave to appeal to this Court dismissed May 20, 2010 (SCC File No. 33588).

[14] *Griffin v. Dell Canada Inc.*, 2010 ONCA 29 at para. 45.

[15] *Griffin v. Dell Canada Inc.*, 2010 ONCA 29 at para. 46.

7(5) permits a court to allow a court proceeding to continue only "with respect to other matters" (underlining added). To repeat, all of the claims of business customers in issue in this case are "dealt with in the arbitration agreement".

19. The motions judge concluded that "[p]ursuant to *Griffin*, this discretion [under subs. 7(5)] may be exercised to allow non-consumer claims (that are otherwise subject to an arbitration clause) to participate in a class action, where it is reasonable to do so." The motions judge decided that it would be unreasonable to separate the consumer and business claims in this case, and declined to stay the claims brought by business customers.[16]

D. Judgment of Court of Appeal for Ontario (2017 ONCA 433)

20. Prior to the appeal, TELUS Mobility sought, and was denied, leave to have the appeal heard by a five-judge panel to reconsider the decision in *Griffin* (which was, itself, a decision of five judges).[17]

21. The Ontario Court of Appeal followed *Griffin* and dismissed the appeal.

(a) *Majority judgment (Weiler and van Rensburg, JJ.A.)*

22. The majority stated that "the sole issue in this appeal is whether the *Griffin* analysis and framework for determining whether a partial stay of proceedings should be granted has been overtaken by a new and different analysis in *Seidel*."[18]

23. The majority decided that *Seidel* did not supersede *Griffin*. The majority reasoned that *Seidel* was decided under the laws of British Columbia, which the Court viewed as materially different from Ontario laws. According to the majority, *Griffin* remains good law in respect of proceedings commenced in Ontario and has not been overtaken by *Seidel*.[19] The Court of Appeal concluded that the motions judge was entitled to refuse a stay of claims brought by business customers.

---

[16] ONSC judgment, paras. 82-91.
[17] ONCA judgment, para. 19.
[18] ONCA judgment, paras. 20, 55, 97.
[19] ONCA judgment, paras. 8, 56-76.

24. The majority also concluded that "there is nothing in Ontario's *Arbitration Act* … to suggest that an arbitration clause removes or ousts the court's jurisdiction over a dispute."[20] The majority rejected "the argument that the substantive right to arbitrate must be given primacy over the procedural vehicle of a class proceeding."[21] Nor does the substantive right to arbitrate supersede the procedural right to a class proceeding, contrary to TELUS's argument.[22]

(b) *Concurring judgment (Blair J.A.)*

25. Blair J.A., concurring in the result, agreed that *Griffin* had not been overtaken, or effectively overruled, by *Seidel* because *Seidel* "did not determine the same issues as those raised in *Griffin*".[23] Although he considered *Griffin* to be binding and dispositive, Blair J.A. had "reservations about the correctness of the decision in *Griffin* as it relates to a partial stay of the non-consumer claims".[24]

26. Blair J.A. flagged two issues which were not addressed in *Griffin* in order "to explain in a general way why I have reservations about the correctness of this Court's decision in *Griffin*":[25]

> [104] First, as a matter of statutory interpretation, may the words "other matters" in s. 7(5) of the *Arbitration Act 1991* – when considered in the context of s. 7 as a whole and the purposes of that Act – be read in a way that cross-pollinates the partial-refusal-to-stay power from a single arbitration agreement context to other arbitration agreements involving different parties and containing arbitration clauses that are otherwise valid and enforceable? Or do "other matters" refer to other matters arising between the same contracting parties but that are not covered by the arbitration agreement between them? One of the purposes of the *Arbitration Act 1991* is to encourage parties to resolve their disputes through private arbitration proceedings and to support their agreements to do so. Section 7 accomplishes the latter by providing for a mandatory stay of court proceedings unless one of the enumerated exceptions applies (which is not the case here) and, having regard to its overall wording, appears to address circumstances relating to a single arbitration agreement, and not the interconnection between a number of such agreements

[20] ONCA judgment, para. 85.
[21] ONCA judgment, para. 90.
[22] ONCA judgment, paras. 87-90.
[23] ONCA judgment, para. 102.
[24] ONCA judgment, para. 101.
[25] ONCA judgment, paras. 103-106.

> involving different parties. This would work against the approach taken in *Griffin*, but was not considered in that case.
>
> [105] Secondly, and more generally, ought litigants be entitled to sidestep what would otherwise be substantive and statutory impediments to proceeding in court with an arbitral claim by the simple expedient of adding consumer claims (which cannot be stayed, by virtue of the *Consumer Protection Act*…) to non-consumer claims (which generally are subject to a mandatory stay) and wrapping all claims in the cloak of a class proceeding? Put another way, may the *Class Proceedings Act.*.. (a procedural rights statute) be used to override the provisions of the *Arbitration Act 1991* affording contractual parties the right to agree to binding arbitration (a substantive right)?....

27. Blair J.A. concluded that "[w]hatever the answers to [these questions] may be, they were not addressed by the *Griffin* court, which appears to have approached the problem more from the perspective of whether the class action was a preferable approach in order to avoid a multiplicity of proceedings or, in some cases, to avoid the impracticality of no proceedings at all." He stated that these questions "may warrant further consideration at another time".[26]

28. Following the decision of the Court of Appeal, TELUS Mobility wrote to Chief Justice Strathy to again ask to have the matter reconsidered by a five-judge panel. This request was declined.

[26] ONCA judgment paras. 103, 106.

PART II - QUESTIONS IN ISSUE

29. TELUS Mobility submits that this case raises important questions about whether the lawful choice of arbitration by business customers can be displaced by including them within a mass consumer class action raising the same or similar issues.

PART III - STATEMENT OF ARGUMENT

A. This case raises issues of public importance that should be resolved by this Court

30. The relationship between arbitration and litigation has the potential to affect millions of parties to disputes across the country; the issues arising in this case are therefore questions of national importance. The interpretation and application of arbitration legislation also gives rise to an issue of public importance. As is addressed in more detail below, the decisions reflect some courts' historical and paternalistic scepticism of the arbitration process. The Ontario courts' out-dated view of arbitration has led to the perpetuation of a manifestly incorrect interpretation of the *Arbitration Act* and the erroneous refusal to allow business disputes to be resolved in the arbitration forum chosen by contract. In the result, the Ontario courts have usurped a jurisdiction that is not available to courts in other provinces with similar arbitration legislation. The discrepancy in the approaches taken to arbitration across the country creates uncertainty and inequity. Only this Court is in a position to reconcile the conflicting jurisprudence and establish consistency across the country. The continued and consistent application across the country of the requirement for a clear legislative override of an otherwise enforceable arbitration agreement is of public importance.

B. The decision below is inconsistent with the recognition of the uniform statutory endorsement of arbitration

31. Canadian law favours giving effect to arbitration agreements. For decades this Court has acknowledged that arbitration is a legitimate and just means to resolve disputes. Historical suspicion about the process has been discarded. "The virtues of commercial arbitration have been recognized and indeed welcomed by" this Court.[27] Arbitration is accepted as an appropriate process to resolve all manner of disputes, and is available except where the legislature has expressly removed the subject matter of the dispute from the reach of arbitration.[28]

---

[27] *Seidel v. TELUS Communications Inc*., [2011] 1 S.C.R. 531, 2011 SCC 15 at para. 23.

[28] *Desputeaux v. Éditions Chouette (1987) inc.*, [2003] 1 S.C.R. 178, 2003 SCC 17 at para. 22 and at para. 38: "the trend in the case law and legislation … has been, for several decades, to accept and even encourage the use of civil and commercial arbitration, particularly in modern western legal systems, both common law and civil law."

32. This Court has accepted that class proceedings legislation, in particular, does not confer on a superior court jurisdiction over cases that would otherwise fall within the subject-matter jurisdiction of another tribunal such as a grievance arbitrator under a collective agreement. A class action "cannot serve as a basis for legal proceedings if the various claims it covers, taken individually, would not do so" (underlining added).[29] This Court has emphasized that "[t]he class action is a procedure, and its purpose is not to create a new right."[30] The decision sought to be appealed violates this basic principle. The dissenting justice in the Court of Appeal, Blair J.A., recognized this when he asked, "ought litigants be entitled to sidestep what would otherwise be substantive and statutory impediments to proceeding in court with an arbitral claim by the simple expedient of adding consumer claims … to non-consumer claims (which generally are subject to a mandatory stay) and wrapping all claims in the cloak of a class proceeding?"[31] The Ontario Court of Appeal should have followed this Court's jurisprudence and answered this question with an unequivocal "no".

33. *Seidel*, in particular, emphasizes deference to contracting parties' decision to arbitrate unless this choice is clearly ousted by legislation.[32]

34. In *Seidel*, this Court was unanimous in agreeing that arbitration clauses are to be respected absent a legislative override. This is so even if the arbitration clause is contained in a consumer contract or a contract of adhesion:[33]

> The choice to restrict or not to restrict arbitration clauses in consumer contracts is a matter for the legislature. Absent legislative intervention, the courts will generally give effect to the terms of a commercial contract freely entered into, even a contract of adhesion, including an arbitration clause….

35. *Seidel* involved a consumer's claim against TELUS Communications Inc. pursuant to British Columbia's consumer protection legislation, the *Business Practices and*

---

[29] *Bisaillon v. Concordia University*, [2006] 1 S.C.R. 666, 2006 SCC 19 at para. 17; see also paras. 22, 45, 64.

[30] *Dell Computer Corp. v. Union des consommateurs*, [2007] 2 S.C.R. 801, 2007 SCC 34 at para. 105; see also para. 108.

[31] ONCA judgment para. 105.

[32] *Seidel v. TELUS Communications Inc.*, [2011] 1 S.C.R. 531, 2011 SCC 15 at paras. 2, 23-26, 42 (majority *per* Binnie J., McLachlin C.J. and Fish, Rothstein and Cromwell JJ. concurring) and 54-56, 89, 99-120, 137, 140, 160, 170 (dissent *per* LeBel and Deschamps, JJ., Abella and Charron JJ. concurring).

[33] *Seidel v. TELUS Communications Inc*., [2011] 1 S.C.R. 531, 2011 SCC 15 at para. 2.

Consumer Protection Act (the "BPCPA"). Where this Court diverged (in a 5-4 split) was in deciding whether s. 172 of the BPCPA, which permits certain claims to be brought in court, constitutes a legislative override of the parties' freedom to choose arbitration.[34] The majority concluded that s. 172 of the BPCPA did constitute a legislative override of the arbitration agreement in question, but only in respect of claims that fell within s. 172: "It is only to the extent that [Ms. Seidel] can bring her case within s. 172 of the BPCPA that the legislative override in s. 3 will extricate her from the arbitration clause to which she agreed in the TELUS contract." All other claims were stayed in favour of arbitration. The prospect of "bifurcated proceedings" did not prevent this result.[35]

36. The minority in *Seidel* concluded that the BPCPA does not manifest explicit legislative intent to foreclose the use of arbitration in consumer claims, and would have upheld "the stay of court proceedings to allow the arbitration process contractually agreed to by the parties to run its course."[36]

37. In summary, this Court has accepted that arbitration agreements are enforceable except in those instances where the legislature has explicitly foreclosed arbitration. This is so even if a class action is contemplated and even if it may lead to "bifurcated" proceedings where some consumer claims proceed in court. Consistency in the judicial application of these principles is of national importance.

38. As the decision sought to be appealed illustrates, some courts have resisted this Court's message. Leave to appeal should be granted to ensure that the principles articulated by this Court are followed and to promote consistency across the country.

C. ***Seidel* required a different approach and result in this case**

39. The judgments below permit the device of a class proceeding to displace mandatory arbitration in the absence of a legislative override, contrary to the general principles of national application adopted by this Court in *Seidel*.

---

[34] In *Seidel v. TELUS Communications Inc*., [2011] 1 S.C.R. 531, 2011 SCC 15, Binnie J. emphasized the "*public* interest nature of the s. 172 remedy" and confirmed that "s. 172 stands out as a public interest remedy" (at paras. 32 and 36, italics in original).

[35] *Seidel v. TELUS Communications Inc*., [2011] 1 S.C.R. 531, 2011 SCC 15 at paras. 31-32, 50, *per* Binnie J..

[36] *Seidel v. TELUS Communications Inc.*, [2011] 1 S.C.R. 531, 2011 SCC 15 at para. 56, *per* LeBel and Deschamps, JJ..

40. The Ontario Court of Appeal justified its refusal to follow *Seidel* on the ground that Ontario legislation is different from the legislation in issue in *Seidel.*[37] With respect, the Ontario *Arbitration Act* is entirely consistent with other provincial and federal arbitral legislation in its deference to arbitration.

41. As in most Canadian jurisdictions, the Ontario *Arbitration Act* requires a court, on application, to stay proceedings in favour of arbitration except in very limited circumstances.[38] Subsection 7(1) of the *Arbitration Act*[39] establishes the foundational principle in favour of arbitration, requiring the court to stay proceedings in respect of a matter to be submitted to arbitration:

> **7**(1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding.
>
> [Underlining added]

42. Subsection 7(1) is subject only to specific and limited exceptions listed in subs. 7(2), none of which apply here.[40]

43. The Ontario Court of Appeal acknowledged in another recent decision that the language in subs. 7(1) is mandatory, not discretionary, and that the legislation strongly favours giving effect to arbitration agreements.[41]

44. As submitted earlier, the choice available under subs. 7(5) is between staying court proceedings in respect of some matters and staying court proceedings in respect of all matters, even those that are not covered by an arbitration clause. The choice is not between staying some matters and not staying any matters at all. Subsection 7(5) does

---

[37] ONCA judgment, para. 8.

[38] See, *e.g., Arbitration Act,* R.S.B.C. 1996, c. 55, . 15.

[39] Section 7 of the *Arbitration Act* is reproduced in its entirety in Part VII, below.

[40] The exceptions in subs. 7(2) are: legal incapacity of a party, invalidity of the arbitration agreement, the subject-matter is not capable of being the subject of arbitration under Ontario law, undue delay, and where the matter is proper for default or summary judgment.

[41] *Haas v. Gunasekaram*, 2016 ONCA 744 at paras. 9-13.

not authorize a court to refuse a stay in respect of matters which are required to be arbitrated, as with the claims of business customers in the case.[42]

45. The premise on which the Court of Appeal rejected this Court's decision in *Seidel* is flawed. Nothing in the Ontario *Arbitration Act* authorizes a court to ignore an arbitration agreement that requires all matters in issue (such as the claims advanced on behalf of business customers) to be submitted to arbitration. The Ontario Court of Appeal decision is directly at odds with this Court's jurisprudence.

D. Business claims are subject to arbitration in other provinces

46. The result of the Ontario Court of Appeal judgment is that class proceedings in the courts of Ontario will include business customers whose claims would otherwise be subject to arbitration as agreed by contract.

47. Courts in British Columbia, Saskatchewan and Québec have correctly separated consumer claims from business claims in proposed class actions involving an arbitration agreement. These decisions recognize that courts may not adjudicate claims within a class action where they would not have jurisdiction if the claims were brought individually.[43]

48. The result in Ontario also means that the enforceability of an arbitration agreement as against business customers depends on the form of the action in which the claim is brought. If brought alone, or in conjunction with the claims of other business customers, the claim must be stayed. But if included with consumer claims, business claims may be litigated and the arbitration agreement ignored. The result is not just contrary to policy, it undermines the very bargain made, introducing uncertainty and inequity. Businesses can no longer rely on their freedom of contract, the allocation of risk and the selection of a particular mode of dispute resolution with the attendant benefits and burdens in terms of the time, expense and process for resolving disputes.

---

[42] J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 2nd ed. (New York: Juris, 2011) at p. 289 (underlining added).

[43] *Frey v. Bell Mobility Inc*., 2008 SKQB 79, application for leave to appeal dismissed 2010 SKCA 30; *Chatfield v Saskatchewan Telecommunications*, 2014 SKCA 29; *Telus Mobilité c. Comtois*, 2012 QCCA 170 at paras. 18-24; see also *Ileman v. Rogers Communications Inc*., 2014 BCSC 1002 at para. 9; appeal dismissed 2015 BCCA 260; application for leave to appeal dismissed Feb. 11, 2016.

49. The Ontario Court of Appeal decision leads to inconsistent results across the country and, to repeat, ignores this Court's guidance about the public importance of deference to arbitration.

E. The result below is inconsistent with other appellate decisions

50. Provisions equivalent to subs. 7(5) appear in the arbitration statutes of five provinces: Alberta, Saskatchewan, Manitoba, New Brunswick, and Nova Scotia.[44]

51. The Saskatchewan Court of Appeal has rejected the interpretation of the partial stay power adopted in Ontario. The stay provision appears as subs. 8(5) of the Saskatchewan *Arbitration Act*.[45] In *Saskatchewan Power Corporation v. Alberici Western Constructors, Ltd.*,[46] the Saskatchewan Court of Appeal said this about the partial stay power:[47]

> [50] Section 8(5) is also worth emphasizing in this regard. It specifically contemplates that a court can stay those aspects of a litigation proceeding dealing with matters subject to arbitration and allow the litigation to continue with respect to the rest of a claim. The only restriction on this authority is that, as *per* s. 8(5)(b), it is reasonable to separate the matters subject to arbitration from the other matters. In the present context, this is significant because it shows the Legislature was alert to the possible difficulties posed by a multiplicity of proceedings but chose not to address them by way of giving the courts a residual discretion to prefer the litigation process over arbitration….
>
> [54] At the end of the day, the *Arbitration Act* is clear. When a claim comes within the terms of an arbitration agreement, a court "shall" stay the action with respect to that claim. The only exceptions are the limited ones enumerated in s. 8(2). This will doubtless sometimes create inefficiencies in resolving disputes where a contract does not include an appropriate multi-party arbitration clause. Costs might be duplicated. There could be a risk of inconsistent findings of fact or law. However, this is the inevitable and foreseeable consequence of the way the *Arbitration Act* is worded.
>
> [Underlining added]

---

[44] *Arbitration Act*, R.S.A. 2000, c. A-42, s. 7(5); *Arbitration Act, 1992*, S.S. 1992, c. A-24.1, s. 8(5); *.Arbitration Act*, C.C.S.M., c. A120, s. 7(5); *Arbitration Act*, R.S.N.B. 2014, c. 100, s. 7(5); *Commercial Arbitration Act*, S.N.S. 1999, c. 5, s. 9(5); *Arbitration Act, 1992*, S.S. 1992, c. A-24.1, s. 8(5).

[45] *Arbitration Act, 1992*, S.S. 1992, c. A-24.1.

[46] *Saskatchewan Power Corporation v. Alberici Western Constructors, Ltd.*, 2016 SKCA 46.

[47] *Saskatchewan Power Corporation v. Alberici Western Constructors, Ltd*., 2016 SKCA 46 at paras. 50-54.

52. The Ontario Court of Appeal, in the decision sought to be appealed, relied on a Manitoba judgment, *Briones v. National Money Mart.*[48] *Briones* did not, however, address the issues presented in the instant case. In *Briones,* some of the statutory claims advanced by the representative plaintiff were subject to an arbitration clause while others were not. In those circumstances, the Manitoba courts declined to grant a partial stay of the arbitrable claims and permitted the plaintiff to continue proceedings in court. *Briones* does not present the dichotomy between consumer and business claimants that exists in the present case. In any case, the Manitoba courts did not address the question mandated by this Court's decision in *Seidel,* namely whether there was a specific legislative override of an arbitration clause.

53. Conflicting interpretations of arbitration legislation demonstrate the need for this Court to grant leave in order to reconcile the jurisprudence.

F. Commentary doubts Ontario interpretation

54. The public importance of these questions, and their national character, is supported by academic commentary noting the importance of the issue to arbitral practice, and doubting the correctness of *Griffin* and this case.

55. In *Arbitration Law of Canada,*[49] J. Brian Casey questions the decision in *Griffin* as well as an earlier decision of the Alberta Court of Appeal, *New Era Nutrition v. Balance Bar*[50]. The Alberta Court of Appeal decided in *New Era* that it if was not possible to separate the matters covered by an arbitration agreement from those not covered, the court action should continue and the arbitration should be stayed. Mr. Casey comments as follows:[51]

> The interpretation given by the [Alberta] Court of Appeal appears to be the converse of what subsection 7(5) actually says.

---

[48] *Briones v. National Money Mart Co.*, 2013 MBQB 168, appeal dismissed 2014 MBCA 57, cited at paras. 75 and 76 of ONCA judgment.

[49] J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 2nd ed. (New York: Juris, 2011) at pp. 283-289.

[50] *New Era Nutrition v. Balance Bar*, 2004 ABCA 280. As in *Briones v. National Money Mart Co.*, 2013 MBQB 168, the *New Era* case concerned disputes between two parties, some of which were subject to arbitration while others were not. *New Era* did not involve prospective claims by consumer and business plaintiffs.

[51] *Arbitration Law of Canada: Practice and Procedure*, at p. 286.

> Section 7(1) sets out the basic provision that if a party proceeds with the court action with respect to matters which are governed by an arbitration agreement, the court "shall" stay the proceeding. Section 7(5) then grants a partial exception to this general provision by providing that the court may allow proceedings to continue with respect to matters not covered by the arbitration agreement provided it is reasonable to separate those matters from the matters that are covered by the arbitration agreement. Nothing in the words of section 7(5) appears to give the court jurisdiction to allow the entire action to proceed where it is not reasonable to separate the matters in dispute and then say section 7(4) permits a stay of the arbitration. [Subs. 7(4) provides that no arbitration shall be commenced or continue where the court refuses a stay under subs. 7(1)].
>
> Section 7(5) provides that the court may permit those matters not covered by the arbitration agreement to continue to be litigated if it is reasonable to separate those matters from those which are being arbitrated. It does not deal with the reverse situation; that is the court finds that the matters cannot reasonably be separated. In such a case, it is submitted, the court would stay its own proceedings to await the outcome of the arbitration, and then determine if the court action needed to proceed. As described above, there may be circumstances that even where matters may be reasonably separated, the court still has a discretion to stay the court proceedings where the court proceedings would deal with peripheral or secondary claims or parties.

56. Commenting on the *Griffin* decision, and its reliance on an earlier judgment of Thorburn J. of the Ontario Superior Court[52] in Mr. Casey writes:[53]

> The difficulty with the statement of Mr. Justice Thorburn is that there is no "discretion" in the court to deny the stay of proceedings and allow the entire matter to proceed. As the Supreme Court of Canada has said on more than one occasion, arbitration is not part of the judicial system of any state. Reference to section 138 of the *Courts of Justice Act* which directs the court not to permit, where possible, a multiplicity of legal proceedings, does not appear to have any relevance to an arbitration, nor does it give the court any jurisdiction over the arbitration. If there are claims which come within the clear terms of an arbitration agreement then the court "shall" stay the court action with respect to those claims unless it finds the arbitration agreement is not to be enforced for one of the limited reasons set out in the balance of section 7. While it is understandable, particularly in a domestic setting, that the court would be sympathetic to allowing an entire matter to proceed in one forum and would strive to come to that result, the present legislation does not appear to grant them authority to do so. Section 7(5) does not permit a court action to proceed and allow a

---

[52] *Frambordeaux Developments Inc. v. Romandale Farms Ltd*., [2007] O.J. No. 4917, 2007 CanLII 55364 (S.C.).

[53] *Arbitration Law of Canada: Practice and Procedure*, at pp. 288-289.

> valid arbitration to be stayed simply because the court claims appear to overlap with the arbitration claims and cannot reasonably be separated.
>
> [Underlining added]

57. Mr. Casey adds that "the position taken by the Ontario and Alberta Courts of Appeal [in *Griffin* and *New Era*] appears to be at odds" with this Court's judgment in *Seidel* and that *Seidel* "may well call for a further review of this jurisprudence".[54] Mr. Casey points out that:[55]

> Section 7(5) deals with whether or not to permit separate claims not covered by the arbitration agreement to proceed by court action. It does not deal with whether or not the claims covered by the arbitration agreement should be stayed.
>
> [Underlining added]

58. Mr. Casey's observations were endorsed by the Saskatchewan Court of Queen's Bench in *Alberici Western Constructors Ltd v Saskatchewan Power Corporation*.[56] The court there considered subs. 8(1), (2) and (5) of Saskatchewan's *Arbitration Act*,[57] which are comparable to subs. 7(1), (2) and (5) of the Ontario statute. Elson J. reasoned as follows:[58]

> [47] I agree with Mr. Casey's analysis, and respectfully disagree with the reasoning in the *New Era* decision, as well as the decisions that have followed it. In my view, the reasoning in *New Era* is not consistent with the underlying theme of the current legislation, which is that arbitration, freely chosen, takes primacy over litigation. Against the backdrop of this theme, s. 8(1) sets out the circumstances which oblige a court to direct a stay. This obligation is subject only to s. 8(2), meaning that the presence of one or more of the exceptions listed in s. 8(2) is the only basis on which a court is permitted to refuse a stay of the litigation. It is noteworthy that a risk of multiple proceedings or the prospect of third party proceedings are not listed among the exceptions that would permit a court to decline a stay. Indeed, as Mr. Casey points out, s. 8(5) expressly recognizes the possibility of concurrent court and arbitration proceedings where matters

---

[54] *Arbitration Law of Canada: Practice and Procedure*, at p. 289.

[55] *Arbitration Law of Canada: Practice and Procedure*, at p. 289.

[56] *Alberici Western Constructors Ltd v Saskatchewan Power Corporation*, 2015 SKQB 74.

[57] *Arbitration Act, 1992*, S.S. 1992, c. A-24.1.

[58] *Alberici Western Constructors Ltd v Saskatchewan Power Corporation*, 2015 SKQB 74 at paras. 47-48.

> covered by arbitration cannot reasonably be separated from those that are not.
>
> [48] ….I do not accept that s. 8 precludes arbitration in the face of multiple proceedings, multiple parties or third party actions. Considering the list of circumstances set out in s. 8(2), I fail to see how s. 8 can be interpreted in order to create such a preclusion. At most, s. 8(5) contemplates a limited stay where matters can be reasonably separated.
>
> [Underlining added]

59. The Saskatchewan Court of Appeal dismissed an appeal from this judgment, in the decision noted earlier.[59]

60. In a blog post entitled "All Is Not Well, Man: Ontario Courts Should Pay Closer Attention to Arbitration Law When Deciding Arbitration cases"[60] Professor Daimsis similarly questions the result in the courts below both in terms of the underlying principles and their interpretation of the effect of section 7(5) of the Ontario *Arbitration Act.*

61. The reading of the legislation by Mr. Casey and Professor Daimsis represent the only reasonable interpretation of the "partial stay" power. Subs. 7(5) of the Ontario *Arbitration Act* does not authorize a departure from the deference to arbitration expressed by the decisions of this Court including *Seidel*.

G. Leave to appeal in this case is particularly timely and appropriate

62. Despite the five-judge decision in *Griffin*, and despite the decision not to convene a five-judge panel in this case in light of *Seidel*, Justice Blair recognised the need to revisit the correctness of *Griffin.*[61] Indeed, in *Griffin* itself the Ontario Court of Appeal had earlier anticipated that "we are likely to receive further guidance from the Supreme Court of Canada when it decides the appeal in [*Seidel*]."[62] For these applicants an appeal to this

---

[59] *Saskatchewan Power Corporation v. Alberici Western Constructors, Ltd*., 2016 SKCA 46.

[60] Professor Anthony Daimsis, blog post entitled "All Is Not Well, Man: Ontario Courts Should Pay Closer Attention to Arbitration Law When Deciding Arbitration cases", online at: http://baystreetchambers.com/2017/08/08/all-is-not-well-man-ontario-courts-should-pay-closer-attention-to-arbitration-law-when-deciding-arbitration-cases-2/

[61] ONCA judgment at paras. 103-106.

[62] *Griffin v. Dell Canada Inc*., 2010 ONCA 29 at para. 64.

Court is the only "further occasion" to resolve the correctness of *Griffin* that was noted by Justice Blair, and to resolve the basic question of the proper fit between arbitration and litigation in Canada recognised by Chief Justice Richards in *Saskatchewan Power.*[63]

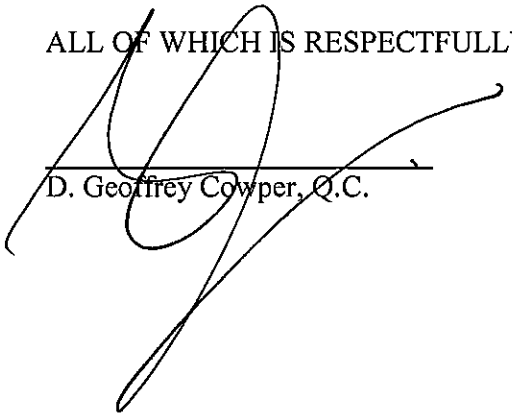
PART IV - SUBMISSIONS ON COSTS

63. In accordance with the Court's usual practice, TELUS Mobility seeks an order that the application for leave to appeal be granted with costs in the cause.

PART V - ORDERS SOUGHT

64. That the application for leave to appeal be granted, with costs of the application in the cause.

ALL OF WHICH IS RESPECTFULLY SUBMITTED THIS 28th DAY OF AUGUST, 2017



D. Geoffrey Cowper, Q.C.

[63] *Saskatchewan Power Corporation v Alberici Western Constructors, Ltd.*, 2016 SKCA 46.

PART VI - TABLE OF AUTHORITIES

Cases	**Para. No(s).**
Alberici Western Constructors Ltd v Saskatchewan Power Corporation, 2015 SKQB 74	58
Bisaillon v. Concordia University, [2006] 1 S.C.R. 666, 2006 SCC 19	32
Briones v. National Money Mart Co., 2013 MBQB 168,	52
Chatfield v Saskatchewan Telecommunications, 2014 SKCA 29	47
Dell Computer Corp. v. Union des consommateurs, [2007] 2 S.C.R. 801, 2007 SCC 34	32
Desputeaux v. Éditions Chouette (1987) inc., [2003] 1 S.C.R. 178, 2003 SCC 17	31
Frambordeaux Developments Inc. v. Romandale Farms Ltd., [2007] O.J. No. 4917, 2007 CanLII 55364 (S.C.)	56
Frey v. Bell Mobility Inc., 2008 SKQB 79	47
Griffin v. Dell Canada Inc., 2010 ONCA 29	2, 6, 15, 17, 19-23, 25-27, 54-57
Haas v. Gunasekaram, 2016 ONCA 744	43
Ileman v. Rogers Communications Inc., 2014 BCSC 1002	47
New Era Nutrition v. Balance Bar, 2004 ABCA 280	55, 57, 58
Saskatchewan Power Corporation v. Alberici Western Constructors, Ltd., 2016 SKCA 46	2, 51, 58, 59, 62
Seidel v. TELUS Communications Inc., [2011] 1 S.C.R. 531, 2011 SCC 15.	2, 12, 31, 33, 34, 35
Telus Mobilité c. Comtois, 2012 QCCA 170	47
Wellman v. TELUS Communications Company et al., 2014 ONSC 3318	9, 14, 19
Wellman v. TELUS Communications Company et al., 2017 ONCA 433	6, 10, 22, 23, 24,-27, 32, 62
Commentary	
J. Brian Casey, *Arbitration Law of Canada: Practice and Procedure*, 2nd ed. (New York: Juris, 2011)	44, 47, 55
Anthony Daimsis, blog post "All Is Not Well, Man: Ontario Courts Should Pay Closer Attention to Arbitration Law When Deciding Arbitration cases", online at: http://baystreetchambers.com/2017/08/08/all-is-not-well-man-ontario-courts-should-pay-closer-attention-to-arbitration-law-when-deciding-arbitration-cases-2/	61, 62

Legislation	
Arbitration Act, 1991, S.O. 1991, c. 17	4
Arbitration Act, 1992, S.S. 1992, c. A-24.1, s. 8(5)	50, 58
Arbitration Act, C.C.S.M., c. A120, s. 7(5)	50
Arbitration Act, R.S.A. 2000, c. A-42, s. 7(5)	50
Arbitration Act, R.S.B.C. 1996, c. 55, . 15	41
Arbitration Act, R.S.N.B. 2014, c. 100, s. 7(5)	50
Commercial Arbitration Act, S.N.S. 1999, c. 5, s. 9(5)	50
Consumer Protection Act, 2002, S.O. 2000	6, 11

PART VII - STATUTORY PROVISIONS RELIED ON

***Arbitration Act, 1991*, S.O. 1991, c. 17, s. 7**

Stay

7. (1) If a party to an arbitration agreement commences a proceeding in respect of a matter to be submitted to arbitration under the agreement, the court in which the proceeding is commenced shall, on the motion of another party to the arbitration agreement, stay the proceeding. 1991, c. 17, s. 7 (1).

Exceptions

(2) However, the court may refuse to stay the proceeding in any of the following cases:

1. A party entered into the arbitration agreement while under a legal incapacity.

2. The arbitration agreement is invalid.

3. The subject-matter of the dispute is not capable of being the subject of arbitration under Ontario law.

4. The motion was brought with undue delay.

5. The matter is a proper one for default or summary judgment. 1991, c. 17, s. 7 (2).

Arbitration may continue

(3) An arbitration of the dispute may be commenced and continued while the motion is before the court. 1991, c. 17, s. 7 (3).

Effect of refusal to stay

(4) If the court refuses to stay the proceeding,

(a) no arbitration of the dispute shall be commenced; and

(b) an arbitration that has been commenced shall not be continued, and anything done in connection with the arbitration before the court made its decision is without effect. 1991, c. 17, s. 7 (4).

Agreement covering part of dispute

(5) The court may stay the proceeding with respect to the matters dealt with in the arbitration agreement and allow it to continue with respect to other matters if it finds that,

(a) the agreement deals with only some of the matters in respect of which the proceeding was commenced; and

(b) it is reasonable to separate the matters dealt with in the agreement from the other matters. 1991, c. 17, s. 7 (5).

No appeal

(6) There is no appeal from the court’s decision. 1991, c. 17, s. 7 (6).